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Chair: Mr. Arrocha Olabuenaga (Vice-Chair) . . . . . (Mexico)

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19-18887 (E)

In the absence of Mr. Mlynár (Slovakia), Mr. Arrocha Olabuenaga (Mexico), Vice-Chair, took the Chair.

The meeting was called to order at 3 p.m.

Agenda item 79: Report of the International Law Commission on the work of its seventy-first session (*continued*) (A/74/10)

1. **The Chair** invited the Committee to continue its consideration of chapters I to V and XI of the report of the International Law Commission on the work of its seventy-first session (A/74/10).

2. **Ms. Mills** (Jamaica), referring to the topic "Sea-level rise in relation to international law", said that the three subtopics (issues related to the law of the sea, issues related to statehood and issues related to the protection of persons affected by sea-level rise) should be addressed in a manner that would help States to determine appropriate measures to adopt and lay the groundwork for the progressive development of rules of international law on climate change, with reference in particular to State responsibility, the precautionary approach, mitigation, adaptation, damage and loss, and compensation.

3. Approximately 25 per cent of the population of Jamaica and much critical infrastructure, such as ports and tourist facilities, were located within the country's coastal zone. Sea-level rise and storm surges would have an impact on the economy, since an estimated 90 per cent of gross domestic product was generated in the coastal zone. Sea-level rise was also expected to exacerbate coastal erosion, resulting in damage to or increased loss of coastal ecosystems, threatening property and infrastructure and causing saltwater intrusion into underground coastal aquifers. Jamaica could not afford not to protect itself from sea-level rise, however high the cost. Her delegation hoped that the Commission's work on sea-level rise would spur the development of international law on climate change in a manner that supported security and stability and protected the most vulnerable communities and States.

4. **Mr. Kanu** (Sierra Leone) said that his remarks would be preliminary in nature and without prejudice to his delegation's final position on the topics at hand. Referring to the topic "Crimes against humanity", he noted that the international legal framework for addressing the core international crimes was anchored by a number of landmark treaties, in particular the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the Geneva Conventions of 1949 and the Protocols thereto. Global accountability efforts could be significantly strengthened by a multilateral treaty on the prevention and punishment of crimes against humanity, which would fill a major gap in the current substantive law on international crimes, especially if it enhanced horizontal cooperation between States in the investigation and prosecution of crimes against humanity. The draft articles on prevention and punishment of crimes against humanity adopted on second reading reflected an appropriate mix of codification and progressive development of international criminal law.

5. His delegation was grateful to the Commission for its efforts to address the extensive comments received on the draft articles as adopted on first reading, including those from Sierra Leone. His written statement, available on the PaperSmart portal, contained substantive remarks on the following points: the fifth paragraph of the draft preamble; the change made to the title of the draft articles, in which equal importance was now accorded to prevention and punishment of crimes against humanity; draft article 1, concerning the scope *ratione materiae* of the draft articles; draft article 2 (Definition of crimes against humanity), in which his delegation welcomed the fact that the description of persecution in paragraph 1 (h) did not include a reference to a connection with the crime of genocide or war crimes; the inclusion in the same paragraph of the words "in connection with any act referred to in this paragraph", which narrowed the scope of acts punishable as persecution; the clarifications regarding paragraph 3 of the same draft article and the accompanying commentary; the clarification of the general obligations set out in draft article 3; the obligation of prevention under draft article 4 and the need for discussion with regard to the 2005 World Summit Outcome and the responsibility to protect; and draft article 5 (Non-refoulement), in which his delegation was pleased to note that the phrase "in the territory under the jurisdiction of the State concerned" had been replaced with "in the State concerned".

6. As explained in its written comments on the draft articles adopted on first reading, Sierra Leone would have appreciated the inclusion in the text of a reference to liability for incitement to commit crimes against humanity and conspiracy to commit such crimes. Incitement and conspiracy in relation to the commission of genocide were punishable under the Convention on the Prevention and Punishment of the Crime of Genocide. Incitement as a form of accessorial liability was also well established in customary international law. It was a significant form of participation in relation to the crime of genocide and also in relation to crimes against humanity. His delegation believed, as the Commission itself had concluded in its prior work, that direct and public incitement of another individual to

commit a crime against humanity should attract criminal responsibility for the perpetrator. It was the understanding of his delegation that the Commission's decision not to include incitement or conspiracy in the draft articles was not intended to affect the fact that those acts attracted criminal responsibility in customary international law.

7. His delegation continued to note that there was no provision for a monitoring mechanism in the draft articles. The use of an existing mechanism, such as the Office on Genocide Prevention and the Responsibility to Protect, might have been considered as an alternative in the absence of a specific proposal from the Commission for a standalone monitoring body such as those responsible for monitoring the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance.

8. Without prejudice to its position in any future negotiations, his delegation's general impression was that the draft articles provided a robust and transparent foundation for a future global convention on the prevention and punishment of crimes against humanity.

9. Turning to the topic of peremptory norms of general international law (*jus cogens*), he said that his delegation aimed to offer detailed written comments in due course, as requested by the Commission. With regard to the draft conclusions adopted on first reading, his delegation fully endorsed draft conclusion 3. It also noted the compromise outcome concerning the concept of regional *jus cogens* and the substance of draft conclusions 5, 7, 16–19 and 21 and the commentaries thereto. His delegation noted the Commission's discussion on draft conclusion 16 and would provide further substantive comments in written form in due course. It noted that, in draft conclusion 23, the Commission sought to resolve the sensitive debate on whether to have a non-exhaustive list of peremptory norms, in view of the methodological challenges inherent in developing such a list. It applauded the effort to find a middle ground by providing a non-exhaustive list of norms that the Commission had, in its prior work on State responsibility and the law of treaties, identified as possessing a peremptory character, rather than an original list of norms. His delegation endorsed the content of the list, in particular the right of self-determination, whose status as a peremptory norm should not be called into question.

10. His delegation welcomed the inclusion by the Commission of the topic "Sea-level rise in relation to international law" in its current programme of work and the topics "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law" and "Prevention and repression of piracy and armed robbery at sea" in its long-term programme of work. Noting the completion of work on the topic of crimes against humanity and the pending completion of work on two other topics, his delegation would favour the inclusion of the topic "Universal criminal jurisdiction" in the programme of work. There was growing support among Member States for the Commission to move ahead with the topic, especially given that the General Assembly had decided, in its resolution 73/208, that the consideration of the scope and application of universal jurisdiction by the Sixth Committee was without prejudice to its consideration in other forums of the United Nations and that, with the first reading on the topic of *jus cogens* now completed and work on the topic "Immunity of State officials from foreign criminal jurisdiction" due to reach a similar stage in 2020, there was no substantive overlap that would justify delaying work on universal criminal jurisdiction.

11. Lastly, his delegation supported the call by the African Group for the Commission to take a more balanced approach to the addition of new topics to the current programme of work and the selection of Special Rapporteurs. The Commission ought to strive for a balance between traditional and newer topics and take into account feedback from individual States on particular topics and the level of participation in debate. Few members from developing regions, especially Africa, had served as Special Rapporteurs over the Commission's 71-year history. Addressing that imbalance could help to enhance the legitimacy and authority of the Commission's work and the perception of international law as a truly universal body of law.

12. **Mr. Diakite** (Senegal) said that a rationalization of the topics addressed by the Commission and improvements to the format of its report would facilitate States' understanding of its work. Moreover, that work should not be based on a single doctrinal approach emanating from a single legal culture and expressed in a single language. The Commission's future and the ownership of its work by States would depend on its ability to anchor its work in the diversity of practices, cultures, opinions and judicial systems.

13. His delegation supported the recommendation to elaborate an international convention on the basis of the draft articles on prevention and punishment of crimes against humanity adopted on second reading. However, the success of common efforts to put an end to atrocity crimes depended on respect by all for the fundamental bases of human society. His delegation was therefore concerned at the absence, in the final version of the draft

articles, of a definition of gender based on that contained in article 7, paragraph 3, of the Rome Statute of the International Criminal Court, which would likely be a major obstacle to the elaboration of a convention.

14. Convinced of the need to develop and strengthen States' capacity to investigate and prosecute the most serious international crimes, his country had joined the initiative for a new multilateral treaty on mutual legal assistance and extradition for domestic prosecution of such crimes. It welcomed, therefore, the reference to extradition and mutual legal assistance in the draft articles. The two initiatives reinforced and complemented each other in the pursuit of the common goal of combating impunity.

15. **Mr. Chrysostomou** (Cyprus), referring to the topic "Crimes against humanity", said that the lack of a general multilateral convention establishing a framework for the prevention and punishment of crimes against humanity and the promotion of international cooperation in that regard represented a lacuna, given the existence of frameworks pertaining to genocide, war crimes and torture and the limited existing provisions for mutual legal assistance and extradition. Moreover, the Rome Statute primarily regulated relations between States and the International Criminal Court. The Statute and other instruments setting up international or hybrid criminal courts or tribunals addressed the prosecution only of crimes falling under their jurisdiction. His delegation, therefore, saw merit in elaborating a convention on the basis of the draft articles adopted by the Commission on second reading; such a convention could complement existing treaties and the mutual legal assistance initiative, which would cover genocide and war crimes as well as crimes against humanity and which his delegation also supported. In order to avoid duplication, however, a clearer distinction between that initiative and a future convention was needed.

16. His delegation appreciated the Commission's efforts to avoid legal conflicts with the Rome Statute. Before further steps towards the elaboration of a convention were contemplated, it was important to address any remaining inconsistencies so that the two instruments would be mutually reinforcing. His delegation was concerned that the reference to persecution in draft article 2, paragraph 1 (h), contained no mention of a connection with the other crimes under the jurisdiction of the International Criminal Court, namely genocide, war crimes and the crime of aggression. That was at odds with article 7, paragraph 1 (h), of the Statute. The draft articles should include a clear statement on immunities that was consistent with article 27 of the Statute (Irrelevance of official capacity). With regard to a possible new draft article on reservations, in the form of a final clause that would be left to States to draft, his delegation was of the view that, in line with article 120 of the Statute, no reservations to a future convention based on the draft articles should be allowable.

17. With regard to the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted by the Commission on first reading, his delegation welcomed draft conclusions 10–13 on the legal consequences of a conflict of a treaty with a peremptory norm, which were consistent with the 1969 Vienna Convention on the Law of Treaties. In view of the fact that the effects of *jus cogens* were not limited to the realm of treaties, his delegation was pleased that the Commission, in the draft conclusions, effectively addressed obligations created by unilateral acts of States and by resolutions, decisions or other acts of international organizations, when they were in conflict with a peremptory norm of general international law. His delegation concurred with the decision not to include a draft conclusion on regional *jus cogens*. *Jus cogens* was by definition universal as it reflected the fundamental values of the international community and was accepted and recognized as such by the international community of States as a whole under article 53 of the Convention. The notion of regional *jus cogens* should therefore be avoided as it might create unnecessary confusion.

18. In contrast to the topic of identification of customary international law, where the elaboration of a list of customary rules would not have been feasible, the comparatively limited number of *jus cogens* norms made it possible to envisage an illustrative list. Nonetheless, such an exercise should not proceed in haste. Work should continue on draft conclusion 23 and the accompanying commentary with a view to offering a non-exhaustive list of norms previously referred to by the Commission as having the status of *jus cogens*, which, under the draft conclusion, would be without prejudice to the existence or subsequent emergence of other peremptory norms. His delegation noted that several members of the Drafting Committee had expressed the view that the list should include other norms. The Special Rapporteur and the Commission should continue their analysis of which norms were to be included in the list and provide thorough reasoning in the commentary as to why they were considered peremptory.

19. **Mr. Bagherpour** (Islamic Republic of Iran), referring to the topic of crimes against humanity, said that the objective of preventing and punishing such crimes would be achieved only if efforts to that end were guided purely by human rights concerns and free from political considerations and selective approaches. With regard to the draft articles on prevention and punishment

of crimes against humanity adopted on second reading, the obligation of States to prevent crimes against humanity, as currently worded in draft article 4, was too broad and accorded little freedom to national systems with regard to administrative and procedural matters. More importantly, under subparagraph (b), States were under an obligation to cooperate, as appropriate, with "other organizations", which, as stated in the commentary to the draft article, included non-governmental organizations. However, neither the legal basis for such an obligation, if any, nor the practice of States in that respect had been addressed in the commentary. In his delegation's view, it was inappropriate to impose such an obligation on States.

20. Draft article 6, paragraph 8, concerning the liability of legal persons, should be regarded as progressive development of international law. His delegation was reluctant to go along with the provision, which represented a substantial change to the well-established principle of individual criminal responsibility set out in article 25 of the Rome Statute and might conflict with other well-established rules of international law. It might also create practical difficulties and uncertainty in respect of the implementation of other draft provisions, including draft article 14 (Mutual legal assistance). The issue should thus be addressed in the national laws and decisions of States.

21. His delegation was concerned about the possible implications of draft article 2, paragraph 3, which provided that the draft article was without prejudice to any broader definition of crimes against humanity provided for in any international instrument, in customary international law or in national law. It was doubtful to what extent that provision would serve the purpose of harmonization of national laws. Rather, it might lead to further fragmentation of the concept of crimes against humanity. Moreover, the fact that customary international law was singled out represented a challenge to the non-hierarchical order of the main sources of international law; it also called into question the defined scope of the proposed text. The use of the term "international instrument" raised similar concerns, particularly in the light of the explanation in the commentary that it was to be understood as being broader than just a legally binding international agreement and could include other instruments such as the resolutions of international organizations.

22. His delegation took issue with the failure to include in the draft articles the requirement of dual criminality, since it was a well-established principle both in the area of extradition, as enshrined in numerous international instruments, and in customary international law.

23. His delegation was of the view that the phrase "membership of a particular social group" contained in draft article 13, paragraph 11, in the context of substantial grounds for refusal to extradite, could be open to a wide range of divergent interpretations that would impede cooperation on extradition. Its deletion would render the draft article clearer and more robust.

24. In the light of those comments and the varied comments of other Member States, and given that crimes against humanity were already addressed in numerous international instruments and mechanisms and that principles such as *aut dedere aut judicare* and bilateral judicial assistance agreements provided a sufficient legal basis for the prevention and punishment of such crimes, it was the view of his delegation that the draft articles still needed some work in order to allow Member States to make an informed decision thereon. Such an important instrument, based on the valuable work of the Commission, should be the product of an inclusive intergovernmental process driven by Member States in the Sixth Committee.

25. With regard to the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted on first reading, his delegation was of the view that the notion of regional *jus cogens* was not supported by State practice and might generate conceptual and practical difficulties, given the inherently universal character of *jus cogens*. It therefore agreed with the Commission's decision not to include norms of a purely bilateral or regional character in the scope of the topic

26. With regard to draft conclusion 16, his delegation was of the view that the hierarchical superiority of rules of *jus cogens* applied equally to the resolutions, decisions and other acts of United Nations bodies, in particular the Security Council. Article 103 of the Charter of the United Nations provided only that the obligations under the Charter prevailed over obligations under any other international agreement. Therefore, in the event of a conflict between *jus cogens* norms and the obligations under the Charter, *jus cogens* norms prevailed.

27. In that context, Security Council resolutions that were contrary to general principles of international law and the provisions of the Charter would not create any obligations for States. The adoption by the Security Council of a resolution that was in conflict with a rule of *jus cogens*, although unlikely, was not impossible. Moreover, a Security Council resolution might, at the stage of implementation, lead to a conflict with rules of *jus cogens*, which had occurred on occasion. The draft conclusion must, therefore, contain a clear reference to Security Council resolutions. A previous version of the provision, proposed as draft conclusion 17 by the Special

Rapporteur in his third report (A/CN.4/714), had included such a reference, but regrettably it had not been retained in draft conclusion 16 adopted on first reading. That was surprising, given that, at the seventy-third session of the General Assembly, almost all Member States had been, explicitly or implicitly, in favour of its inclusion. The failure to include such a reference could even call the Security Council's credibility into question, as it could be interpreted as meaning that the Council considered itself above the law and not bound even by the peremptory norms of general international law. His delegation also remained cautious with regard to the diverse consequences of *jus cogens* norms and urged the Commission to review its approach in that regard.

28. His delegation requested the deletion of draft conclusion 22, because a "without prejudice" clause was incompatible with the scope of the topic. With regard to draft conclusion 23, the need for a non-exhaustive list of *jus cogens* norms was questionable, as it might substantially alter the process-oriented nature of the topic and give the misleading impression that the Commission was responsible for recognizing and identifying *jus cogens* rules. The Commission should concentrate on methodology and secondary rules rather than the legal status of particular norms. Furthermore, identifying certain norms as *jus cogens* norms might be controversial at the current stage and warranted in-depth study under a separate future topic.

29. When selecting topics for future study, the Commission must consider the needs and priorities of States and the existence of sufficient State practice. With regard to the topic "Prevention and repression of piracy and armed robbery at sea", his delegation noted that it was important to avoid any conflict with existing treaties, including the United Nations Convention on the Law of the Sea, under which the legal regime regarding piracy, based on the relevant customary international law, had already been codified. Armed robbery against ships, by definition, occurred in the territorial waters of coastal States and was not covered by the Convention. Rather, it was governed by arrangements determined or agreed upon in bilateral and multilateral agreements by coastal States, which had exclusive sovereign rights over their territorial waters. While his delegation recognized the importance of the topic, it was of the view that it should be approached with caution.

30. The topic "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law" fell under two separate categories of international law, each with its own characteristics and requirements. There was a direct link between the topic and the articles on responsibility of States for internationally wrongful acts and, until there was a clear outcome on the latter, it would be difficult to achieve consensus. Moreover, there was insufficient State practice on the topic, which meant that the Commission's work on it could be considered progressive development. The same was true of the topic of universal criminal jurisdiction, which did not easily lend itself to codification, given that State practice was limited and varied greatly. It would therefore be premature for the Commission to include those two topics in its current programme of work.

31. **Mr. Taufan** (Indonesia) said that it had been difficult to give the Commission's report the thorough consideration it deserved, given the limited time between the issuance of the report and the start of the current session.

32. With regard to the draft articles on prevention and punishment of crimes against humanity adopted on second reading, his delegation attached particular importance to draft articles 6, 7, 13 and 14. Cooperation between States was key to ending impunity, protecting the rights of victims and upholding justice, and should be enshrined in an agreement, which should cover extradition and mutual legal assistance in particular. With regard to criminalization under national law and the establishment of national jurisdiction, the human rights courts of Indonesia had jurisdiction over gross violations of human rights committed by Indonesians, irrespective of where the crime was committed, and 9 of the 11 acts listed in draft article 2 had been criminalized under Indonesian law. A framework for the protection of witnesses and victims of crimes against humanity and genocide had also been put in place. It was the responsibility of the international community to end impunity and deny safe haven to individuals who committed crimes against humanity. Nonetheless, there were still divergences of position regarding the scope and application of the principle of universal jurisdiction, which was reflected in the wide range of crimes designated as crimes against humanity, and their scope, according to a variety of sources.

33. The definition of *jus cogens* set out in the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted on first reading was in line with article 53 of the 1969 Vienna Convention. Nevertheless, his delegation wished to conduct further study of other aspects of the text, especially draft conclusions 4 and 6. The notion of *jus cogens* had long been debated in his country. In the *Landslide* case of 2003, the Indonesian Supreme Court had ruled that national judges could cite rules of international law if they viewed them as *jus cogens*.

34. His delegation considered the topic “Sea-level rise in relation to international law” to be of great importance. With regard to the topic “Provisional application of treaties”, the draft Guide to Provisional Application of Treaties could become a useful tool for addressing special circumstances in that regard, provided there was an agreement on provisional application between the States concerned. His Government, however, would have to give further consideration to the draft Guide, especially in the light of a recent ruling by the Indonesian Constitutional Court regarding the interpretation of Law No. 24 of 2000 on international treaties.

35. **Mr. Oña Garcés** (Ecuador), referring to the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted on first reading, said that his delegation welcomed the statement that the three main sources of international law, namely custom, treaties and general principles of law, could all serve as bases for peremptory norms. The draft conclusions served to clarify the manner in which such norms were to be identified and their legal consequences with regard to treaties, customary rules, general principles of law, unilateral acts of States and the resolutions of international organizations. They also served to confirm that such norms reflected and protected the fundamental values of the international community, were hierarchically superior to other rules of international law and were universally applicable. Moreover, the draft conclusions served to underline the fact that peremptory norms gave rise to obligations *erga omnes*, and to highlight the consequences of peremptory norms for circumstances precluding wrongfulness under the rules on the responsibility of States for internationally wrongful acts.

36. With regard to the topic “Crimes against humanity”, his delegation supported the recommendation that a convention be elaborated by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles on prevention and punishment of crimes against humanity adopted on second reading. Such a convention would fill a gap in the international legal order with regard to the most serious international crimes and would facilitate cooperation between States and the adoption of relevant national laws.

37. On the topic “General principles of law”, his delegation supported the draft conclusions proposed by the Special Rapporteur in his first report (A/CN.4/732). The Commission’s consideration of the topic would complete its work on the three main sources of international law, namely treaties, custom and general principles of law. In his report, the Special Rapporteur had analysed practice related to general principles of law prior to the adoption in 1920 of the Statute of the Permanent Court of International Justice; the inclusion of a reference to general principles of law in Article 38 both of that Statute and of the Statute of the International Court of Justice; and practice related to general principles of law after the adoption of both Statutes. The Special Rapporteur’s analysis of the legal nature and elements of general principles of law, and of their origins either in national legal systems or in the international legal system, was supported by State practice, case law and doctrine.

38. Lastly, his delegation welcomed the inclusion of the topic “Sea-level rise in relation to international law” in the current programme of work.

39. **Mr. Mabhongo** (South Africa) said that crimes against humanity were the only category of serious international crime not currently governed by an international convention. His delegation therefore welcomed the adoption of the draft articles on prevention and punishment of crimes against humanity on second reading. Cooperation between States and the strengthening of domestic laws were crucial to the prevention of such crimes. The draft articles provided a possible mechanism for facilitating those processes. They established a requirement that States criminalize crimes against humanity, which South Africa had done under the Implementation of the Rome Statute of the International Criminal Court Act of 2002. That Act also provided for the exercise of universal jurisdiction over crimes against humanity by South African courts.

40. Turning to the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted on first reading, he said that strengthening *jus cogens* was critical to upholding the rule of law at the international level. It was important to reinforce the minimum standards against which the conduct of States should be measured. The Commission’s work would doubtless provide greater certainty in that area. His delegation welcomed the fact that the Commission had decided not to adopt any draft conclusions until the complete set was ready for consideration. That approach had helped to ensure an integrated set of draft conclusions.

41. Under the balanced approach adopted by the Commission, which his delegation welcomed, existing instruments such as the 1969 Vienna Convention had served as a point of departure but the Commission’s work had ultimately been driven by available State practice and the case law of international courts. His delegation welcomed the fact that the Commission had not attempted to provide answers to theoretical questions but had confined itself to the task of progressive development and codification. With regard to draft

conclusion 1, his delegation concurred with the Special Rapporteur's view that the notion of regional *jus cogens* did not find support in State practice. It might have been valuable to include that point in the commentary to the draft conclusion. On draft conclusion 2, his delegation agreed with the Commission's decision to rely on the definition of *jus cogens* in article 53 of the 1969 Vienna Convention. As stated in the commentary, although that definition was characterized in the Convention as being used "for the purposes of the Convention", it was now accepted in State practice as the general definition of peremptory norms of general international law.

42. Draft conclusion 3 (General nature of peremptory norms of general international law (*jus cogens*)) was especially important. His delegation had noted the minority views referred to in the commentary to the effect that the characteristics set out in the draft conclusion were not supported by practice. Given the wealth of material in the commentary, that view was surprising; his delegation hoped that the Commission would reconsider the inclusion of the reference to it on second reading. Equally surprising was the minority view that the relationship between those characteristics and the criteria for the identification of a peremptory norm set out in draft conclusion 4 was obscure. On the contrary, it was quite clear from the commentary that those characteristics might contribute, indirectly, to the application of the criteria.

43. Part Two of the draft conclusions was straightforward. The Commission could, however, adopt a clearer line concerning the role of general principles of law and treaty law in the formation of peremptory norms. The phrase "a very large majority of States" in draft conclusion 7 was sufficiently balanced; his delegation did not believe, as suggested by the minority view, that there should be a requirement that all States, or even virtually all States, accept and recognize the peremptory character of a norm. Such a requirement would be tantamount to establishing a veto right over the establishment of peremptory norms.

44. His delegation was concerned about the balance in draft conclusion 9; it appeared to exclude the possibility that decisions of national courts might also serve as a subsidiary means for the determination of peremptory norms.

45. With regard to Part Three of the draft conclusions, his delegation largely agreed with the Commission's approach to the legal consequences of peremptory norms, including the decision to adhere to the wording of the 1969 Vienna Convention in relation to the consequences of peremptory norms for treaties. However, it was sympathetic to the view expressed in paragraph (2) of the commentary to draft conclusion 11 that in some cases severability might be justified, even where a conflict with a peremptory norm existed at the time of conclusion of the treaty in question.

46. With regard to draft conclusion 16, the Commission should state explicitly in the text of the draft conclusion that Security Council resolutions were also subject to peremptory norms, rather than addressing that point only in the commentary.

47. On draft conclusion 19, his delegation considered all breaches of peremptory norms to be serious breaches. It therefore agreed with the minority view that the particular consequences of breaches of peremptory norms should apply to all breaches and hoped that the word "serious" would be deleted on second reading.

48. *Jus cogens* was a topic of fundamental importance. His delegation urged all States to provide comments on the draft conclusions in a timely manner so as to allow the Commission to complete the second reading on the topic in 2021.

49. **Ms. Ponce** (Philippines), speaking on the topic "Crimes against humanity", said that her country remained committed to combating impunity for such crimes and had passed legislation to that effect, even though it had withdrawn from the Rome Statute. It considered the draft articles on prevention and punishment of crimes against humanity adopted by the Commission on second reading an important contribution to the international community's collective efforts to deter and curtail atrocity crimes. While her delegation understood the enthusiasm of certain delegations and the Commission to proceed immediately to the negotiation of a convention based on the draft articles, it cautioned against proceeding with undue haste, as the draft articles required further consideration by States. It agreed with the United States that the draft articles should be flexible in implementation and take into account the diversity of national systems and the needs of both States parties and non-States parties to the Rome Statute, and also prevent overbroad assertions of jurisdiction by national and international courts.

50. With regard to the topic of peremptory norms of general international law (*jus cogens*), she said that her delegation would be submitting its full comments and observations by the 2020 deadline and that its comments at the current juncture were preliminary in nature. With regard to the draft conclusions adopted by the Commission on first reading, paragraph 2 of draft conclusion 7, which stated that "acceptance and recognition by a very large majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*)", appeared to be

inconsistent with draft conclusion 2, which stated that "a peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole", based on the wording of article 53 of the 1969 Vienna Convention. The reference to a "very large majority of States" suggested a merely numerical standard and did not reflect the fact that the acceptance and recognition had to be across regions, legal systems and cultures, as the Commission explained in the commentary to the draft conclusion. Her delegation would continue to reflect on that point. Her delegation was also still pondering the value of having a non-exhaustive list of peremptory norms, as indicated in draft conclusion 23, especially since the Commission stated in its commentary to the draft conclusion that there had been no attempt to define the scope, content or application of the norms identified.

51. Turning to the topic "Provisional application of treaties", she said that her delegation regarded the revised draft model clauses on provisional application of treaties as complementary to the draft Guide to Provisional Application of Treaties, providing guidance to States that wished to resort to provisional application of treaties under article 25 of the 1969 Vienna Convention, and not as encouraging resort to provisional application. Her delegation would submit further comments on that subject prior to the commencement of the second reading of the draft Guide at the seventy-second session of the Commission.

52. While it was inclined to support the inclusion of the topic "Prevention and repression of piracy and armed robbery at sea" in the Commission's long-term programme of work, her delegation considered that the direction taken must be consistent with the United Nations Convention on the Law of the Sea and should take into account regional arrangements and practices. It welcomed the inclusion of the topic "Sea-level rise in relation to international law" in the programme of work and the establishment of an open-ended Study Group.

53. **Mr. Nyanid** (Cameroon) said that his delegation urged the Commission and the Committee to enhance their interaction, in line with General Assembly resolution 73/265, with a view to improving dialogue with States, which were the makers and subjects of international law. The report of the Commission should be made available to Member States in a timely fashion so as to facilitate its proper consideration. A culture of genuine multilingualism should also be built into the Commission to allow all Member States to engage fully on the complex issues under consideration by the Commission in their languages.

54. Referring to the topic "Crimes against humanity", he said that his delegation was committed to combating impunity and thus attached great importance to the prevention and punishment of crimes against humanity. Nonetheless, it called for the clarification of certain concepts related to the topic, to avoid crimes being established arbitrarily. In that connection, his delegation believed that much work remained to be done before a proper definition of crimes against humanity could be developed. It wished, for example, to see the concepts of immunity and the responsibility to protect respected, so long as the State in which a crime was committed was determined to prosecute the perpetrators of such crimes. It also wished to see that the consensus of States and true wishes of States were always sought, as certain States were taking advantage of the uncertainty in the law surrounding the topic to use it in a selective manner to justify their interference in the internal affairs of other States.

55. Turning to the topic "Peremptory norms of general international law (*jus cogens*)", he said that it should be considered carefully to ensure consistency with the Vienna Convention. His delegation had yet to reach a decision on the principle of including a non-exhaustive list of peremptory norms in the draft conclusions proposed by the Special Rapporteur and was concerned about some of the norms included on the proposed list. His delegation would wish to see the focus on State practice and *opinio juris*, which was the best way of determining the willingness of States to elevate certain norms to *jus cogens* norms with *erga omnes* scope. It was worth noting that States could refuse to accept *jus cogens* by not ratifying the 1969 Vienna Convention, for example. Moreover, many States parties to the Convention had formulated reservations regarding the unilateral referral of disputes on the application of articles 53 and 64 to the International Court of Justice.

56. His delegation therefore suggested that the draft conclusions stay true to the Westphalian principle of international law, whereby that law was one made by States for States. It would be counter-productive for the mandatory character of a norm of international law to be enshrined in a draft conclusion. Indeed, the reluctance of the International Court of Justice to refer to *jus cogens* was reflective of the sensitive nature of those norms. At no point in its case law did it use the expression "*jus cogens*", although it had recognized the concept through the term "obligations *erga omnes*", meaning in respect of all.

57. His delegation therefore supported draft conclusion 7 (International community of States as a whole) and, in particular, the wording that "a very large majority of States is required for the identification of a

norm as a peremptory norm of general international law (*jus cogens*)". Bearing in mind the principle of the sovereign equality of States, customary law was established on the basis of its acceptance by the greatest possible number of States, irrespective of their size, influence or wealth.

58. His delegation welcomed the inclusion of the topic "Prevention and repression of piracy and armed robbery at sea" in the Commission's long-term programme of work. It would like to see the enforcement of existing treaties in that area, such as the United Nations Convention of the Law of the Sea and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, and greater coordination of anti-piracy operations and capacity-building between the affected States. It trusted that the Commission, in addressing the topic, would bear in mind relevant developments in law and practice, maintain the current international legal framework and promote international cooperation and coordination in the areas of criminalization and mutual legal assistance with regard to piracy.

59. His delegation had reservations about the wisdom of adding the topic "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law" to the long-term programme of work, given that several other initiatives of a similar nature were under way and the international community was divided as to whether such violations fell under international human rights law or international humanitarian law. Moreover, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law had already provided guidance to States on how to address the issue and might be sufficient for their needs. The focus should be on implementing the Principles and Guidelines rather than on formulating new rules.

60. **Mr. Duarte** (Paraguay), referring to the draft articles on prevention and punishment of crimes against humanity adopted on second reading, noted that, among the crimes over which international courts and tribunals typically had jurisdiction, genocide and war crimes were already the subject of global conventions. It was therefore imperative that the international community develop a legally binding instrument on prevention and punishment of crimes against humanity. Under the Constitution of Paraguay, the international protection of human rights was provided for; torture and cruel, inhuman or degrading punishment or treatment were prohibited; and the crimes of genocide, torture, enforced disappearance of persons, kidnapping and homicide for political reasons were imprescriptible. Paraguay had also enacted a law implementing the Rome Statute, under which crimes against humanity, genocide and war crimes were criminalized. It reiterated its firm support for a global, legally binding convention on crimes against humanity, which would be a critical addition to the current framework of international law, in particular international humanitarian law, international criminal law and international human rights law. It could also help draw further attention to the need to prevent and punish such crimes and could foster inter-State cooperation in that regard.

61. Paraguay attached great importance to the International Law Seminar as a means for the dissemination, strengthening and development of international law in legal systems worldwide. All regions of the world should be represented among its participants.

62. **Ms. Rodríguez** (Peru), referring to the draft articles on prevention and punishment of crimes against humanity adopted on second reading, said that her delegation supported the Commission's recommendation that the General Assembly or an international conference of plenipotentiaries prepare a convention on the basis of the draft articles. Peru also welcomed the affirmation in the preamble to the draft articles that crimes against humanity threatened the peace, security and well-being of the world, and that the prohibition of such crimes was a peremptory norm of general international law (*jus cogens*). As crimes against humanity were among the most serious crimes of concern to the international community as a whole, it was necessary to end impunity for the perpetrators of such crimes and thus contribute to preventing them. Her delegation appreciated the fact that the Commission had taken into account the definition of crimes against humanity set forth in article 7 of the Rome Statute. However, given that the draft articles constituted the basis for a future convention concerning such crimes, the definition of "enforced disappearance of persons" set forth in paragraph 2 (i) of draft article 2 was overly restrictive and should be aligned with the definition set out in the International Convention for the Protection of All Persons from Enforced Disappearance.

63. Turning to the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted on first reading, she said that, with regard to draft conclusion 3, her delegation agreed that peremptory norms of general international law reflected and protected fundamental values of the international community, were hierarchically superior to other rules of international law and were universally applicable. It was appropriate that the concept of regional *jus cogens* had not been included in the draft conclusions, given

that *jus cogens* was universal. As stated in paragraph 2 of draft conclusion 7, peremptory norms of general international law were accepted and recognized by the international community of States as a whole – in other words, by a very large majority of States – without requiring acceptance and recognition by all States. The concept of *jus cogens* was therefore not incompatible with the existence of norms that had a special status or particular importance for a region or group of States. Indeed, the emergence of a *jus cogens* norm could be a process that began in a specific region of the world.

64. On the topic "Provisional application of treaties", Peru supported the proposal to include a set of draft model clauses in the draft Guide to Provisional Application of Treaties as an annex. It also welcomed the inclusion in the Commission's programme of work of the topic "Sea-level rise in relation to international law", since sea-level rise was a global problem and posed a particular threat to the survival of small island developing States. Peru agreed with the subtopics proposed for consideration by the Study Group on the topic, namely issues related to the law of the sea, issues related to statehood and issues related to the protection of persons affected by sea-level rise. In addition, Peru commended the inclusion in the Commission's long-term programme of work of two new topics of contemporary relevance. Lastly, she wished to highlight her country's full support for the United Nations Audiovisual Library of International Law, which contributed to the dissemination of knowledge on important matters of international law and embodied the principle of multilingualism by providing easy access to materials in Spanish and other official languages of the United Nations.

65. **Monsignor Hansen** (Observer for the Holy See) said that the persistence of political, religious and ethnic violence around the world was a matter of great concern. Crimes against humanity must be condemned and confined to history.

66. In accordance with the principle of *aut dedere aut judicare*, States had an obligation to prosecute crimes against humanity within their borders, to cooperate with each other and with the relevant intergovernmental organizations, which might require the extradition of wrongdoers, and to provide assistance to victims. In that connection, the Holy See supported the Commission's recommendation that the General Assembly or an international conference of plenipotentiaries prepare a convention on the basis of the draft articles on prevention and punishment of crimes against humanity adopted on second reading. His delegation particularly welcomed draft article 5 (Non-refoulement), according to which people must not be returned to places where they might be subjected to crimes against humanity. Refugees and migrants fleeing persecution should be welcomed, protected, helped and integrated into society.

67. The proposed new convention should be focused on codifying existing customary law and promoting international cooperation. Modifying the agreed definition of crimes against humanity before State practice and *opinio juris* had fully developed would not be conducive to achieving a broad consensus. In that connection, it was regrettable that the Commission had decided not to include in the draft articles the definition of "gender" set forth in article 7, paragraph 3, of the Rome Statute, which constituted an integral part of the definition of crimes against humanity under the Statute. Moreover, the sources mentioned in paragraphs (41) and (42) of the commentary to draft article 2 did not constitute State practice and did not serve as evidence of States' *opinio juris*.

68. Under a future convention, all people, in particular those at risk of falling victim to crimes against humanity, should have the opportunity to seek justice and have their voices heard at the international level. The threat of crimes against humanity could be eliminated by increasing international cooperation in the area of prevention, supporting recovery and rescue efforts and bringing perpetrators to justice. A future convention should also provide for the delivery of assistance to States with weak judicial and security systems in protecting racial, ethnic or religious minorities living within their borders and in developing the capacity to provide judicial and extrajudicial protection and remedies to victims. Effective domestic institutions were critical in that regard. In addition to adopting new legal instruments, the international community must strengthen preventative diplomacy mechanisms and early warning systems to put an end to crimes against humanity.

69. **Mr. Aragón Cardiel** (Observer for the Permanent Court of Arbitration), referring to the topic "General principles of law" and the draft conclusions proposed by the Special Rapporteur in his first report (A/CN.4/732), said that general principles of law had been applied in a number of arbitrations considered by tribunals administered by the Permanent Court of Arbitration. The practice of those tribunals could thus assist the Commission in its proposed work on the origins, identification and functions of those principles. In a number of early cases, tribunals administered by the Court had determined that general principles of law originated from, inter alia, the domestic law of various States and historical sources such as Roman law, suggesting that such principles were common to different legal traditions and had often stood the test of

time. The tribunal in the *Muscat Dhows* case of 1905 had explicitly identified precise sources of general principles of law, referring to the "principles of the law of nations" as originating from treaties, internationally recognized legislation and international practice. Similarly, the tribunal in the 2008 *Abyei Arbitration* between the Government of Sudan and the Sudan People's Liberation Movement/Army had decided, given the paucity of authority on what "excess of mandate" concretely represented in law, to rely on principles of review applicable in public international law and national legal systems, insofar as the latter's practices were commonly shared, which it had deemed might be relevant as "general principles of law and practices". Thus, by suggesting that general principles of law had a dual domestic and international origin, the Court's case law lent support to draft conclusion 3.

70. With regard to the identification of general principles of law, including the question of the requirement of recognition, as set forth in Article 38, paragraph 1 (c) of the Statute of the International Court of Justice, he noted that tribunals administered by the Permanent Court of Arbitration had found that the principles of, inter alia, unjust enrichment, estoppel by representation, judicial estoppel, abuse of rights and *uti possidetis juris* met that requirement. On the other hand, tribunals in investor-State disputes such as the *Yukos* arbitration had rejected the existence of a "clean hands" principle on the ground that that principle did not meet the level of recognition and consensus traditionally required to qualify as a general principle of law. Accordingly, in future reports, the Special Rapporteur might wish to consider whether recognition of certain general principles of law must be specifically proven for such principles to be applied and, if so, what kind of materials might serve as evidence of recognition.

71. With regard to the functions of general principles of law, several tribunals in proceedings administered by Court had applied general principles of international law in circumstances where treaties or customary international law did not provide a rule of decision. Relevant examples included the application of the "proceed at your own risk principle" in the *Indus Waters Kishenganga Arbitration* between Pakistan and India and the invocation, in the *Arbitration between the Republic of Croatia and the Republic of Slovenia*, of the presumption that States acted in a manner consistent with their legal obligations. Tribunals had also considered whether specific obligations for States, such as the obligation to pay compensatory interest in the event of late payment of a debt, arose from general principles of law. Lastly, tribunals had often applied general principles specifically relevant to dispute settlement and matters of procedure, such as the principles of burden of proof, evaluation of evidence and award of interest or costs. More detailed comments on the arbitrations cited could be found in his written statement, available on the PaperSmart portal.

72. **Mr. Polakiewicz** (Observer for the Council of Europe) said that his delegation supported the Commission's recommendation to prepare a convention on the basis of the draft articles on prevention and punishment of crimes against humanity adopted on second reading. As noted by the Special Rapporteur in his reports, the Council of Europe had been one of the first bodies to address the prevention of impunity for crimes against humanity, through the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes of 1974, which was aimed at ensuring that statutory limitations did not prevent the punishment and prosecution of crimes against humanity and the most serious violations of the laws and customs of war. In assessing the Convention's relevance in 2016, the Council's Committee of Legal Advisers on Public International Law had concluded that the Convention could constitute evidence of international custom, as reflected in a significant number of judgments of the European Court of Human Rights in which the Convention had been referred to directly or indirectly.

73. With regard to draft article 4, the case law of the European Court of Human Rights contained a number of references to the obligation of prevention. For example, in the commentary to the draft article, it was noted that the Court had held that States parties had an obligation, pursuant to article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, to prevent torture and other forms of ill-treatment. In addition, the Court's extensive case law concerning non-refoulement was mentioned in the commentary to draft article 5. The Council of Europe attached great importance to national laws aimed at ending impunity for crimes against humanity. It therefore particularly welcomed draft article 6 (Criminalization under national law) and draft article 7 (Establishment of national jurisdiction).

74. With regard to draft article 12 (Victims, witnesses and others), the protection of victims and the provision to them of assistance and reparations were key elements of a successful criminal justice response, based on the rule of law, to the most serious crimes of concern to the international community. In the Council's legal corpus, victims and witnesses of such crimes were placed at the centre of the justice system. For example, under the European Convention on the Compensation of Victims of Violent Crimes, States parties were required to compensate the victims of intentional crimes of violence

resulting in bodily injury or death. The Council's Committee of Ministers had also made relevant recommendations to member States. Moreover, several conventions concluded within the framework of the Council of Europe contained binding provisions relating to assistance and compensation to victims of the most serious crimes, such as terrorism, trafficking in human beings and violence against women. In addition, in a 2014 judgment, the European Court of Human Rights had found that the relatives of victims of war crimes had a right to an investigation of the circumstances under which their relatives had died, and to the prosecution of those responsible. The Committee of Ministers had also adopted revised guidelines on the protection of victims of terrorist acts, in which it set out the measures to be taken by member States in order to ensure the fundamental rights of such victims, including the implementation of a general legal framework to assist them; the provision of assistance in legal proceedings; and measures to ensure the social recognition of victims and involve them in the fight against terrorism.

75. The Council of Europe had extensive experience in the domain of international cooperation in criminal matters, in particular with regard to extradition and mutual legal assistance, as provided for in draft articles 13 and 14, respectively. Such cooperation was essential to improving the effectiveness and efficiency of the punishment and prosecution of crimes against humanity. The Council's legal corpus in the area of extradition and mutual legal assistance dated back to 1957 and comprised eight conventions and protocols. Like draft article 13, the Additional Protocol to the European Convention on Extradition provided for the exclusion of certain crimes against humanity and war crimes from the scope of political offences. In addition, all Council member States and three non-member States had ratified or acceded to the European Convention on Mutual Assistance in Criminal Matters and its two Additional Protocols, which had proven effective in facilitating judicial cooperation well beyond Europe. Those non-member States that had not yet done so were encouraged to accede to those treaties; information on the accession procedure was available on the website of the Council of Europe Treaty Office.

76. **Mr. Murphy** (Special Rapporteur for the topic "Crimes against humanity") said that engagement by Governments from the outset had strengthened the final version of the draft articles on prevention and punishment of crimes against humanity. While the Commission had addressed a number of concerns regarding the draft articles raised in the Sixth Committee and in written comments from Governments, international organizations and others, additional concerns remained, which he hoped could be addressed as Governments considered whether and how to move forward with the negotiation of a convention. He would remain available to Member States beyond the end of his term of office to provide clarifications regarding the Commission's work on the topic of crimes against humanity.

77. The Chair invited the Committee to consider chapter VI (Protection of the environment in relation to armed conflicts), chapter VIII (Immunity of State officials from foreign criminal jurisdiction) and chapter X (Sea-level rise in relation to international law) of the report of the International Law Commission on the work of its seventy-first session (A/74/10).

78. **Mr. Prasad** (Fiji), speaking on behalf of the Pacific small island developing States, namely Kiribati, Micronesia (Federated States of), Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu and his own country, Fiji and referring to the topic "Sea-level rise in international law", said that climate change transcended borders and posed multifaceted risks. The Intergovernmental Panel on Climate Change predicted that the average global sea level could rise by over one metre by 2100, with some regions of the world likely to experience sea-level rise sooner and to a greater extent than others. Sea-level rise presented a particular threat to low-lying small island States and atolls in the Pacific region, which had limited access to fresh water and limited food supplies as a result of saltwater inundation and coastal erosion. It affected well-being, livelihoods, infrastructure, economies and security. In that connection, he called for greater recognition of the nexus between security and climate change.

79. The Pacific small island developing States welcomed the Commission's decision to include the topic in its current programme of work and to establish an open-ended Study Group, which would focus on law of the sea issues in its first year of work. The discussions on the topic would enable Member States to address important legal questions such as the regulation of maritime entitlements, the delimitation of maritime zones and the right of coastal States to an extended continental shelf. The Commission's work in those areas should be guided by the United Nations Convention on the Law of the Sea. He called on Member States to recognize the need to retain maritime zones and the entitlements derived therefrom once such zones had been delineated in accordance with the Convention.

80. **Mr. Laloniu** (Tuvalu), speaking on behalf of members of the Pacific Islands Forum with permanent missions to the United Nations, said that the Forum welcomed the Commission's decision to include the topic

"Sea-level rise in relation to international law" in its current programme of work and to establish an open-ended Study Group on that topic. Sea-level rise was a matter of critical importance for the Pacific region, in particular low-lying small island States and atolls. The region was already facing the adverse effects of rising sea levels, including the deterioration of marine and coastal environments and increasingly destructive storm surges and natural disasters, phenomena that threatened livelihoods, health, culture, well-being and infrastructure.

81. International legal developments in response to sea-level rise must take into account the interests of those particularly affected, including small island developing States, which bore the least responsibility for sea-level rise. In that connection, Forum leaders, at a meeting in Tuvalu in August 2019, had committed themselves to a collective effort, including to develop international law, with the aim of ensuring that, once a Forum member's maritime zones were delineated in accordance with the United Nations Convention on the Law of the Sea, they could not be challenged or reduced as a result of sea-level rise and climate change. His delegation therefore called on Member States to recognize the need to retain maritime zones and the entitlements derived therefrom once such zones had been delineated in accordance with the Convention. That would ensure the sustainable development of the people, communities and cultures of Forum members in the face of sea-level rise.

82. **Mr. Seland** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) and referring to the topic "Protection of the environment in relation to armed conflicts", said that there was increasing recognition of the intrinsic linkages between humanitarian and environmental concerns in conflict situations. In the draft principles adopted on first reading, the Commission addressed many timely issues, including the designation of significant environmental and cultural areas as protected zones; the protection of the environment of indigenous peoples; the prevention and mitigation of environmental degradation in areas where persons displaced by armed conflict were located; and the environmental obligations of an Occupying Power. The Nordic countries also welcomed the inclusion of corporate due diligence and corporate liability and of substantial draft principles on post-conflict measures, in particular cooperation and the sharing of and granting of access to information.

83. The Nordic countries welcomed the Commission's broad approach in preparing the draft principles, taking into account the importance of environmental protection not only during armed conflict but throughout the entire conflict cycle and addressing not only the law of armed conflict but also other applicable areas of international law. The Nordic countries appreciated the fact that the draft principles covered both international and non-international armed conflicts, as both types of conflict could have severe environmental consequences, and welcomed the analysis of the responsibilities of non-State actors in relation to the protection of the environment. They also appreciated the confirmation in draft principle 12 of the applicability of the Martens Clause to the protection of the environment. The draft principles contained provisions of different normative value, ranging from legally binding rules to recommendations intended to contribute to the progressive development of international law. The Commission was to be commended for its transparent and forward-looking approach in ensuring that the wording of each principle indicated its normative value and in clarifying in the commentaries when a principle was based on existing international law and when it was *de lege ferenda*. The draft principles complemented the important work of the United Nations Environment Programme, including the relevant resolutions of the United Nations Environment Assembly, and the International Committee of the Red Cross. The Nordic countries intended to provide more detailed written comments on the draft principles and encouraged others to do likewise.

84. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", the Nordic countries welcomed the fact that the draft articles on the topic were harmonized with the Rome Statute and recalled that the irrelevance of official capacity in relation to individual responsibility for the most serious international crimes before international courts was part of customary international law. The Commission's discussions had again touched on draft article 7, which the Commission had provisionally adopted, and more specifically the link between the procedural aspects of the topic and the exceptions to immunity set out in that draft article. The Nordic countries supported the draft article and believed that the procedural guarantees and safeguards proposed by the Special Rapporteur in her seventh report (A/CN.4/729) could address some of the concerns expressed regarding the draft article by ensuring that all relevant aspects of cases involving claims of immunity were taken into consideration. The Nordic countries fully agreed with the Special Rapporteur's view that procedural arrangements relating to immunity should provide certainty to both the forum State and the State of the official and reduce the inclusion of political considerations and the possibility of abuse of process for political purposes. They also agreed that procedural safeguards should be aimed at protecting the interests of both the forum State and the

State of the official and at building trust between them. The draft rules regarding exchange of information and a flexible mechanism for consultations were important in that regard. The Nordic countries also welcomed the recognition of the right of the State official to benefit from all fair-treatment guarantees. In its future work on the topic, the Commission should take into account the broad differences among national legal systems with regard to the role of the judiciary and the executive and prosecutorial authorities in order to ensure that the draft articles were practicable under different circumstances.

85. Referring to the topic "Sea-level rise in relation to international law", he said that the Nordic countries were deeply concerned by the threat of sea-level rise as a consequence of climate change, which was seriously affecting coastal areas and low-lying coastal countries. The rate of sea-level rise was accelerating; small island States might fully or partially disappear or become unable to support human habitation. Low-lying areas that were not entirely submerged would be vulnerable to destructive erosion, flooding and extreme weather conditions, and salinization would affect agricultural land and result in contamination of freshwater sources. Small island developing States were home to 65 million people, who were among the least responsible for climate change but were likely to suffer the most from its adverse effects.

86. Sea-level rise prompted a number of questions relevant to international law. Changing coastlines affected the location of maritime limits, potentially altering national boundaries and putting vulnerable States at risk of losing land territory. People might also be forced to leave their homes to find assistance and protection abroad. The Commission was well placed to discuss those issues. Given the pressing nature of sea-level rise, the Nordic countries welcomed the decision to move the topic to the current programme of work and to establish an open-ended Study Group on it. They also supported the choice of subtopics for consideration by the Study Group over the next two years. The Nordic countries would endeavour to provide relevant examples of State practice and other information concerning the topic.

87. The United Nations Convention on the Law of the Sea provided the international framework for all activities at sea. It amounted to a common set of rules, ensuring predictability and stability. It was therefore a core priority for the Nordic countries to safeguard and strengthen the Convention system. Those considerations would guide their approach to the topic.

88. Historically, the ocean had not featured prominently in international discussions on climate change. Responding to sea-level rise would require practical as well as legal solutions. Consideration of the legal consequences of sea-level rise must therefore complement and not overshadow the political determination to address climate change. The impact of climate change on security was a particularly pressing issue and would be a priority of Norway, should it be elected as a non-permanent member of the Security Council in 2020.

89. **Mr. Jia** Guide (China), referring to the draft principles on protection of the environment in relation to armed conflicts adopted on first reading, said that the lack of differentiation between international and non-international armed conflicts in the draft principles was a matter of concern. For example, with regard to draft principle 19, which was modelled on the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, the Commission conceded in the commentary that the relevant provisions of that Convention and the obligations under customary international law referred to therein were applicable only to international armed conflicts. No further clarification was given as to whether those rules could be applicable to non-international armed conflicts. There were considerable differences between the two types of conflict in terms of their nature, the actors involved, the extent of the harm caused, and the applicable rules of international humanitarian law. The Commission should therefore give full consideration to such differences and analyse State practice in relation to both types of conflict.

90. Referring to the draft articles on immunity of State officials from foreign criminal jurisdiction, he noted that, two years after the Commission had provisionally adopted draft article 7 by a recorded vote, the exceptions to immunity *ratione materiae* set out in the draft article remained the most contentious dimension of the topic; many delegations had voiced their objections. Moreover, several Commission members still had reservations about the draft article and had requested that it be reviewed. The Commission should pay attention to those views.

91. With regard to the draft articles proposed by the Special Rapporteur in her seventh report (A/CN.4/729), procedural safeguards helped to ensure the inviolability of the immunity of State officials by preventing the initiation of abusive or politically motivated proceedings against them, thus protecting their dignity, facilitating the unimpeded performance of their functions and contributing to the maintenance of stable relations among States. In considering the institutional framework for, and the specific content of, such safeguards, the Commission should take into account the comments and suggestions made on strengthening

them, including the need for full respect by the forum State for the primacy of the jurisdiction of the State of the official; the establishment of a stringent threshold for the initiation of criminal proceedings against foreign State officials; full communication between the forum State and the State of the official so that the latter was fully informed of the case and had the opportunity to express concern; and the formulation of specific safeguard clauses to address the concerns regarding draft article 7. It should nevertheless be noted that even well-designed procedural safeguards could not compensate for the flaw in the substantive rule set out in draft article 7, which must be reformulated in order to better reflect general State practice and *opinio juris*.

92. Turning to the topic "Sea-level rise in relation to international law", he said that sea-level rise affected the vital interests of coastal States and was a new phenomenon that went beyond the current scope of the law of the sea and required examination in relation to many other areas of international law in the light of emerging State practice. His delegation therefore encouraged the Commission to analyse a wide variety of State practice, as well as related legal questions, in order to produce an objective and balanced output. Since climate change was the root cause of sea-level rise, China stood ready to work with other countries to promote the comprehensive implementation of the Paris Agreement and cooperate with neighbouring coastal States in exploring effective responses to climate change.

93. With regard to the topic "Succession of States in respect of State responsibility", he said that there was a dearth of relevant State practice, and that what little practice existed reflected complex and varied political and historical factors. Many of the examples cited by the Special Rapporteur in his third report (A/CN.4/731) were context-specific and were characterized by the signing of special agreements, which hardly attested to the existence of a universal practice or *opinio juris* of States, and which did not lend themselves easily to codification. The paucity of relevant State practice had also led to an over-reliance on academic literature. The Commission might wish to consider whether it should continue working on the topic and, if so, whether to aim for an alternative form of output, such as draft guidelines or an analytical report.

94. Turning to the topic "General principles of law", he said that, given the significance of those principles as a source of international law, a study in which Article 38, paragraph 1 (c), of the Statute of the International Court of Justice was used as a starting point and which contained cautious, rigorous analysis of relevant State practice and the case law of international judicial bodies would contribute to clarifying the nature and origins of general principles of law, the criteria for their identification and their relationship with other sources of international law, thus elucidating their functions and improving the international legal system as a whole.

95. With regard to the draft conclusions proposed by the Special Rapporteur in his first report (A/CN.4/732), the identification of general principles of law should meet clearly defined, strict and objective criteria. In particular, analysis to determine whether a principle met the condition of being recognized by civilized nations, as stipulated in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, must be rigorous, thorough and anchored in State practice. In addition, principles of domestic law recognized by a small minority of States, by States from particular regions or in individual legal systems should not be identified as general principles of law.

96. Furthermore, general principles of law were generally understood as universally applicable rules that originated from national legal systems and served to compensate for the inadequacy of rules of international law. In certain exceptional cases, general principles of law could also arise from international law per se. Given the similarity between general principles of law and customary international law, particularly the fact that the relevant practice in both cases must be universal in nature, the criteria for the identification of general principles of law should be at least as strict as those for the identification of customary international law.

97. **Mr. Tichy** (Austria), referring to the draft principles on protection of the environment in relation to armed conflicts adopted by the Commission on first reading, said that draft principle 9 (State responsibility) provided that damage to the environment for the purposes of reparation included "damage to the environment in and of itself". It would have been clearer to retain the wording of paragraph 3 of draft principle 13 quater proposed by the Special Rapporteur in her second report (A/CN.4/728), namely, that damage to the environment for the purposes of reparation included damage to ecosystem services, irrespective of whether the damaged goods and services had been traded in the market or placed in economic use.

98. His delegation would appreciate confirmation that draft principles 10 (Corporate due diligence) and 11 (Corporate liability) applied to private military and security companies. It should also be expressly stated in the draft principles that international environmental law continued to apply during armed conflicts. In addition, his delegation welcomed the indication that draft principles 20 [19], 21 [20] and 22 [21] applied to all

forms of occupation within the meaning of international humanitarian law, including occupations that met with no armed resistance, in accordance with article 2 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). More detailed comments reflecting his delegation's position on the topic could be found in his written statement, available on the PaperSmart portal.

99. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", it was regrettable that the Commission had not been in a position to discuss in greater detail the draft articles proposed by the Special Rapporteur in her seventh report (A/CN.4/729). The Special Rapporteur obviously intended, as a means of providing safeguards, to propose rules to determine which national organs should be competent to handle matters of immunity. As the determination of such organs fell within the purview of national law, rules in that regard should not be included in the draft articles. With respect to draft article 8, immunity should be considered by all competent authorities at the earliest possible stage, prior to indictment, and not only in the context of judicial proceedings but also in the context of administrative actions and proceedings of the forum State That did not, however, preclude the possibility of conducting the investigations necessary to verify the identity and status of the person invoking immunity.

100. With regard to draft article 9, judicial organs were not the only entities that determined immunity. For example, in situations in which immunity was invoked in response to coercive measures, it was usually the Ministry of Foreign Affairs of the forum State that was consulted by the other executive authorities. Indeed, under Austrian law, if there were doubts as to whether a person enjoyed immunity, judicial organs had to seek the opinion of the Ministry of Justice, which consulted the Ministry of Foreign Affairs on the matter. Similarly, with respect to draft articles 10 and 11, the Special Rapporteur had mentioned that the organ competent to invoke or waive immunity should be part of the judicial system of the State of the official. However, in many legal systems, those matters fell within the purview of the executive branch of government, and therefore it was often the Ministry of Foreign Affairs that had competence in that regard. Draft article 10, paragraph 2, created the impression that there was an obligation to invoke immunity, whereas, under paragraph 1 of the draft article, the invocation of immunity was at the discretion of the State of the official. In the light of the discussion on draft article 11, it would be useful to provide for the possibility that the forum State might request the State of an official enjoying immunity *ratione materiae* to waive that immunity if the official had been accused of committing a serious crime other than those set out in draft article 7. In the case of officials enjoying immunity *ratione personae*, that possibility should be provided for in respect of any serious crime, including those set out in draft article 7. With regard to the various communications among the States concerned, which were addressed in draft articles 11, 12 and 13, the Commission should take into account the fact that the appropriate channel for such communications was the diplomatic channel.

101. During the discussions in the Commission, reference had been made to the crucial link between the procedural aspects of the topic and the exceptions to immunity set forth in draft article 7. Without questioning those exceptions as such, his delegation considered that a possible approach would be to submit any dispute relating to their application and interpretation to the International Court of Justice for review. Such a procedure would undoubtedly strengthen judicial control of the invocation of such exceptions and prevent possible abuses.

102. Draft article 14 (Transfer of proceedings to the State of the official) should provide for assurances to be given to the forum State that genuine criminal proceedings would be conducted in the State of the official. In addition, the forum State should be required to cooperate with the authorities of the State of the official after the transfer of proceedings to ensure that they were in possession of the necessary evidence.

103. As to future work on the topic, the draft articles should be used as the basis for a convention, as that would prevent further discussion regarding the *de lege lata* or *de lege ferenda* nature of certain provisions and would lay the foundations for a mandatory dispute-settlement regime.

104. Turning to the topic "Sea-level rise in relation to international law", he said that, although sea-level rise affected landlocked countries such as Austria only indirectly, its consequences were felt worldwide. The Commission's consideration of the legal challenges resulting from sea-level rise was timely. Austria welcomed the work already done by the Commission and looked forward to the initial results of the work of the Study Group. The provisions of the United Nations Convention on the Law of the Sea must remain unaffected.

The meeting rose at 6 p.m.